

IN THE CIRCUIT COURT OF GHANA HELD IN ACCRA ON TUESDAY, 13<sup>TH</sup> DAY  
OF DECEMBER 2022 BEFORE HIS HONOUR KWABENA KODUA OBIRI-  
YEBOAH, CIRCUIT COURT JUDGE.

SUIT No: C8/16/2019

MARY OTUMLEY CHAINORTEY

PLAINTIFF

V

GRACE OTU CHAINORTEY

DEFENDANTS

CHRISTIAN CHAINORTEY

PATIENCE KENNEDY

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RULING

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On the 1<sup>st</sup> Day of July 2022 when the case was set for case management conference (CMC), Counsel for the Defendant said, not quoting verbatim, we have noticed that the Plaintiff has produced an exhibit to the witness statement which talks about probate with an accompanying Will of the late father of the Plaintiff who is the owner of the property. Counsel went further to state that a careful look of that document raises the issue as to whether the Plaintiff herein has the capacity to initiate the instant action in the first place and the need to determine whether the plaintiff has the capacity to initiate the instant action or not.

The Court then ordered the case management conference to be deferred and further order was given for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as applicants to file their application that is motion paper, affidavit and their written submission and serve same for the plaintiff

to respond accordingly. The Applicants therefore filed a motion on notice to strike out suit for want of capacity, affidavit in support and written submission as well before the court which has been served on the plaintiff/respondent. The plaintiff/Respondent has also filed her processes before the court.

The plaintiff issued the writ from the registry of this court claiming among others recovery of possession of the plaintiff's properties in House No 4, Osu, Ako Adjei. Per the statement of claim, the plaintiff was suing on his own as the beneficial owner of the properties she was claiming. The claim of the plaintiff is that she became the owner by virtue of a probate granted of the movable and immovable property of her father Christopher Joseph Tetteh Chainortey.

Per the application of the applicants, it is their case that the court should strike out the action of the plaintiff for want of capacity. Per the depositions of the accompanying affidavit in support, the applicants stated in paragraph 7 that by the pleadings, the plaintiff is a beneficial owner of the said properties by virtue of a probate granted, the movable and immovable properties of her late father as contained in the alleged testament of the deceased. The applicants stated further in paragraph 8 that even though the said testament was allegedly probated on 29<sup>th</sup> February 2016 the properties divested therein were never vested in the beneficiaries of the estate.

From the records and the exhibits filed intended for CMC, the exhibits the plaintiff intended to rely on is the probate and the Will of the late father. The said exhibits are not in the name of the plaintiff and the plaintiff has not also filed any vesting accent vesting the inherited estate in her name.

Section 1(1) of the Administration of Estates Act, 1961 (Act 63) states as follows:

1(1) "The movable and immovable property of a deceased person shall devolve on his representatives with effect from his death". The law defines the personal representatives in the Act. This means that it is the personal representatives, who will have the capacity to take action, with respect to the estate of the testator.

It is only after the estate is distributed, as required by law, and the estate is accordingly vested in the beneficiaries, with a documentary proof of the vesting assent, that the property would have legally been transferred to the beneficiaries, that the property, can be in their individual names and they can then have control of the property and can then take action with respect of the estate.

The Supreme Court in the case of **Okyere (deceased) (substituted by Peprah) v Appenteng & Adoma (2012) 1 SCGLR 65** per Date-Bah JSC stated, "When a person dies testate or intestate, his estate devolves on the executor or personal representatives until vesting assent has been executed to the beneficiaries or devisee; and until the grant to them of the vesting assent, the beneficiaries and devisees have no title or locus standi over any portion of the estate"

Therefore, as the estate has not been vested in the plaintiff with respect to her portion as a beneficiary, she does not have title or locus standi and therefore does not have capacity to take legal action with respect to the estate as instituted before this court. I have gone through Counsel for the respondent affidavit in opposition and her written submissions and all the authorities she cited **Djin v Musa (2007-2008) SCGLR 686 at page 696, Adisa Boya v Mohammed (Subs by Mohammed & Mujaad (2017-2018) 1 SCGLR 136 and Apeageyi Gyamfi & Anor (2017-2018) 1 SCGLR 299** all dealt with the situation where letters of administration had not been obtained meaning all the deceased died interstate distinguishable from the situation at hand where the deceased

died testate and probate granted to one Jerry Kofi Kaleku and not the Plaintiff/Respondent.

In the case **Asante-Appiah v Amponsah @ Mansah (2009) SCGLR 90 @95**, it was stated that, the failure of the appellant to establish that capacity in which the action was prosecuted was sufficient basis on which to dismiss the appellant's claim. Put differently, even before considering the merits of the case, want of capacity alone was sufficient for the appellant to have lost the case.

In the decision in **Alhaji Mohammed Moru per his Lawful Attorney Mohammed Moru v Mohammed Huseini (2013) 59 GMJ at 16 – 17 & 19** the Supreme Court held citing **Fosua & Adu – Poku v Dufie (Deceased) & Adu Poku Mensah (2009) SCGLR 310** and relying on the decision in **Republic v High Court Accra, Exparte Aryeetey (Ankrah Interested party) (2003-2004) SCGLR 398** stated that “any challenge to capacity puts the validity of the writ in issue” .... and a question like ‘...capacity, like the plea of limitation, is not concerned with the merits so that if the axe falls then as defendant who is lucky to have the advantage of an unimpeachable defence of lack of capacity in his opponent, is entitled to insist upon his right’.

In **Republic v High Court Accra, Ex Parte Aryeetey (Ankrah Interested party)**, the Court held that ‘the capacity to sue was a matter of law and could be raised by a party at any stage of the proceedings, even on appeal. It could even be raised by the court suo moto.’ See **Amissah-Abadoo v Abadoo (1974) GLR 110**, **Sam Jonah v Duodu-Kumi (2003-04) 1 SCGLR 50**.

In the case of *Ebusaupayin Yaw Stephens v Kwesi Apoh (2010) MLRG 26*, the Supreme Court per Anin Yeboah, CJ, held:

“It is therefore the law that if an action succeeds on a plea of statute of Limitation, lack of jurisdiction or lack of locus standing the trial court and for that matter an appellate court should not proceed to determine the merits of the case irrespective of the evidence. Indeed, if an action succeeds on a preliminary point that a suitor lacks the requisite locus standi, it implies that the proper parties are not in court to pronounce on the merits of their case. Equally so, if an action succeeds on statute of limitation, it is implied that the cause of action if any at all, had elapsed by the operation of law and it would be improper for the court to determine the merits of the case when indeed no cause of action subsists.”

In the circumstance therefore the Plaintiff’s action which was commenced by the plaintiff as a beneficiary, even though the property has not been vested in her, would be dismissed for want of capacity.

SGD

**HIS HONOUR KWABENA KODUA OBIRI-  
YEBOAH, CIRCUIT COURT JUDGE.**